

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RITA'S WATER ICE, INC. and	:	CIVIL ACTION
RITA'S WATER ICE FRANCHISE	:	
CORPORATION	:	
	:	
v.	:	
	:	
JOSIE'S WATER ICE, INC.,	:	
ALFRED H. EVERETTS, and	:	
RAYMOND B. OSTROSKI	:	NO. 98-6603

MEMORANDUM AND ORDER

HUTTON, J.

July 7, 1999

Presently before the Court are Defendants Josie's Italian Water Ice, Inc., Alfred H. Everetts, and Raymond B. Ostroski's Motion to Transfer Venue to the Western District of Pennsylvania (Docket No. 2), Plaintiffs' Response thereto (Docket No. 10), and the Defendants' Reply Brief (Docket No. 11). For the reasons that follow, the Defendants' motion is **DENIED**.

I. BACKGROUND

In this action, Plaintiffs Rita's Water Ice, Inc. and Rita's Water Ice Franchise Corporation (collectively, "Plaintiffs" or "Rita's") charges Defendants Josie's Italian Water Ice, Inc., Alfred H. Everetts, and Raymond B. Ostroski (collectively, "Defendants" or "Josie's") with unfair competition and trademarks under the Lanham Act, 11 U.S.C. §§ 1115 and 1125, and other claims arising under state law. The case reaches the Court on Defendants' motion to transfer venue to the Western District of Pennsylvania.

Plaintiffs Rita's Water Ice, Inc. and Rita's Water Ice Franchise Corporation are domiciled in the Eastern District of Pennsylvania, and operate franchise businesses throughout the Eastern District of Pennsylvania. All the Defendants reside in Luzerne County, which is located in the Middle District of Pennsylvania. Josie's Italian Water Ice, Inc. has a principal place of business located at 261 Harris Hill Road, Shavertown, Luzerne County, Pennsylvania, 18708, and is currently operating one (1) location at Rte. 415, Harveys Lake, Luzerne County. Josie's does not operate a retail location within the Eastern District of Pennsylvania. Alfred H. Everetts resides at 112 East St. Mary's Road, Wilkes-Barre, Luzerne County, Pennsylvania, 18702. Raymond B. Ostroski no longer resides at 1667 Fairfield Road, Yarkley, Pennsylvania, 19067. He now resides at 261 Harris Hill Road, Shavertown, Luzerne County, Pennsylvania, 18708.

The Plaintiffs' Complaint alleges the following facts. In the summer of 1996, defendant Ostroski solicited and visited Rita's offices in Bensalem, Pennsylvania for a franchise opportunity in the Wilkes-Barre area. During the process of applying for a Rita's franchise, when defendant Ostroski lived within this District, Ostroski asked Rita's for its market analysis showing where growth for Rita's franchise would be appropriate. After being exposed to Rita's trade secrets and marketing plans and consulting with various members of Rita's franchise system under the pretext of purchasing a franchise, Defendants opened a water ice franchise,

which mirrors the image of Rita's franchise and incorporates the trade secrets of Rita's franchise.

The Plaintiffs contend that Defendants' infringement caused damage to Rita's mark in that it tends to blur and dilute the mark. Additionally, Defendants used the information they obtained under the pretext of purchasing a franchise business to locate other Rita's franchisees, to request information under a pretext from these franchisees, to learn about sources of product, materials and signage, and gather information prepared specifically for defendants concerning market plans and the availability of sites. All of the above information was obtained from either direct visits within the Eastern District of Pennsylvania or by communication to the Eastern District of Pennsylvania, specifically Rita's franchise headquarters. The Complaint also alleges that Defendants engaged in fraudulent conduct in perpetrating a fraud against Rita's by making certain affirmative misrepresentations while in the Eastern District of Pennsylvania intended to induce reliance, ultimately induced reliance and caused Rita's to suffer damages.

II. DISCUSSION

The Defendants move the Court to transfer this case to the United States District Court for the Middle District of Pennsylvania, located in Scranton, Pennsylvania, in the interest of justice pursuant to 28 U.S.C. § 1406(a) or, in the alternative, pursuant to 28 U.S.C. § 1404(a), for the convenience of the parties

and witnesses. The Court shall address each of Defendants' arguments in turn.

A. 28 U.S.C. § 1406(a)

The Defendants assert that venue is not proper in the Eastern District of Pennsylvania, and the case should therefore be transferred to the Middle District of Pennsylvania in the interest of justice pursuant to 28 U.S.C. § 1406(a). The Plaintiffs contend, however, that venue is proper in the Eastern District of Pennsylvania under 28 U.S.C. § 1391(a)(2), asserting that the Eastern District of Pennsylvania is "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." As the Third Circuit has pointed out, events or omissions must be more than tangentially connected to the claim to qualify as substantial under § 1391(a)(2). See Cottman Transmission Sys., Inc., v. Martino, 36 F.3d 291 (3d Cir. 1994). "Substantiality is intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute." Id. at 294. Rather than looking at a defendant's "contacts" with a particular district, the test for determining venue is the location of those "events or omissions giving rise to the claim." Id. To determine whether an act or omission giving rise to the claims is substantial, the court must look at the nature of the dispute. Id. at 295.

As described in the Complaint, each and every event which ultimately led to the instant litigation occurred in the Eastern District of Pennsylvania, with the sole exception of Defendants' opening of a Josie's Water Ice Store in the Middle District of Pennsylvania. For example, the Complaint contends that the Defendants solicited and visited a Rita's franchise system in Bensalem, Pennsylvania under the guise of pursuing a franchise opportunity. Plaintiffs also claim that each and every misrepresentation made by Defendants either directly occurred in the Eastern District of Pennsylvania or was directly communicated by Defendants to Rita's in the Eastern District of Pennsylvania.

Moreover, the Plaintiffs assert that continuing attempts to profit from its theft of Rita's trade secrets are occurring in the Eastern District of Pennsylvania as well as the Middle District of Pennsylvania and other venues. For example, contrary to the assertions made in Defendants' Motion, evidence suggests that the Defendants are actively soliciting franchises in the Eastern District of Pennsylvania. Accordingly, the Court finds that the Defendants have sufficiently alleged that a substantial part of the events giving rise to its claims occurred within the Eastern District of Pennsylvania. Thus, venue is proper and the motion to transfer for improper venue is denied.

B. 28 U.S.C. § 1404(a)

The Defendants argue in the alternative that this action

should be transferred to the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a)(1994). The decision whether to transfer an action pursuant to § 1404(a) rests in the Court's discretion and is reviewed for abuse of discretion. See Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 628, 631-32 (3d Cir. 1989) (decision to grant or deny forum non convenience motion is within sound discretion of trial court). The party seeking transfer of venue bears the burden of establishing that transfer is warranted and must submit "adequate data of record" to facilitate the court's analysis. Ricoh Co. v. Honeywell, Inc., 817 F. Supp. 473, 480 (D.N.J.1993). Before transferring venue, the district court must articulate specific reasons for its decision. Lacey v. Cessna Aircraft Co., 862 F.2d 38 (3d Cir. 1988); Ricoh, 817 F. Supp. at 480.

The Court's analysis under Section 1404(a) is flexible and turns on the particular facts of the case. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29-30, 108 S.Ct. 2239, 2243-44, 101 L.Ed.2d 22 (1988). In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), the Supreme Court listed several factors that guide the Court's decision-making in this area. These

factors fall into two categories: (1) the private interests of the litigants; and (2) the public interest in the fair and efficient administration of justice. Gulf Oil, 330 U.S. at 508-509, 67 S.Ct. at 843.

The private interest factors are: (1) plaintiff's choice of forum; (2) the relative ease of access to sources of proof; (3) the availability and cost of compulsory process for unwilling witnesses; (4) obstacles to a fair trial; (5) the possibility of viewing the premises, if viewing the premises would be appropriate to the action; and (6) all other factors relating to the expeditious and efficient adjudication of the dispute. Gulf Oil, 330 U.S. at 508-09, 67 S.Ct. at 843. The public interest factors are: (1) the relative backlog and other administrative difficulties in the two jurisdictions; (2) the fairness of placing the burdens of jury duty on the citizens of the state with the greater interest in the dispute; (3) the local interest in adjudicating localized disputes; and (4) the appropriateness of having the jurisdiction whose law will govern adjudicate the dispute in order to avoid difficult problems in conflicts of laws. Id.

The Supreme Court articulated these factors with respect to a motion to dismiss for forum non convenience. Nevertheless, courts routinely look to the Gulf Oil factors in deciding a motion to transfer venue under 1404(a). See, e.g., Ricoh, 817 F. Supp. at 479-88. Because transfer of venue is less drastic than dismissal,

however, district courts have broader discretion to transfer venue than to dismiss on forum non convenience grounds. Norwood v. Kirkpatrick, 349 U.S. 29, 32, 75 S.Ct. 544, 546, 99 L.Ed. 789 (1955); All States Freight, Inc. v. Modarelli, 196 F.2d 1010, 1011 (3d Cir. 1952); Ricoh, 817 F. SUPP. at 479.

1. Analysis

Applying these principles to the instant case, the Court cannot find that the Defendants have met their burden of showing that transfer of this case to the Middle District of Pennsylvania will best serve the interests of convenience and justice. The Defendants have failed to show how either the private or the public interests weigh in favor of disturbing Rita's original choice of forum by transferring venue to the Middle District of Pennsylvania.

First, as noted above, the Plaintiffs' choice of forum should not be lightly disturbed. Jumara v. State Farm Insur. Co., 55 F.3d 873, 879 (3d Cir.1995). Moreover, a plaintiff's choice of forum is entitled to deference where the plaintiff has strong ties to the district. Uniroyal Goodrich Tire Co. v. Munnis, Civ. A. No. 89-4584, 1989 WL 135365, at *2 (E.D.Pa. Nov.7, 1989). In this case, Rita's are domiciled in the Eastern District of Pennsylvania and also operate franchise businesses throughout the Eastern District of Pennsylvania.

Second, the purpose of § 1404 is to provide a more convenient forum, not a forum which is equally convenient or inconvenient to

both parties. Van Dusen v. Barrack, 376 U.S. 612, 645-46, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). Similarly, transfer is not designed to switch the economic burden of an inconvenient forum from the defendant to the plaintiff. Micheel v. Haralson, 586 F. SUPP. 169, 173 (1983). It may be true that Rita's choice of forum is inconvenient for the Defendants. This argument fails, however, to persuade the Court that venue should be transferred. The convenience of non-party witnesses is accorded greater weight in the § 1404(a) analysis than party witnesses. See Aquatic Amusement Associates v. Walt Disney World, 734 F. Supp. 54, 57 (N.D.N.Y. 1990); DEV Indus., Inc. v. NPC, Inc., 763 F. SUPP. 313, 315 (N.D.Ill.1991).

Third, in evaluating the convenience of the witnesses, the Court must place emphasis on the materiality of each witnesses' testimony rather than the quantity of proposed witnesses. Austin v. Johns-Manville Corp., 524 F. SUPP. 1166, 1169 (E.D.Pa.1981). "One key witness may outweigh a great number of less important witnesses." Computers Plus, Inc. v. AGS Enters., Inc., Civ. A. No. 89-1406, 1989 WL 37112, at *2 (E.D. Pa. Apr.13, 1989). In the present case, the Defendants merely state that "all of the witnesses to the alleged incidents are located and reside in Luzerne County, Pennsylvania." (Defs.' Mot., 7.) The Defendants fail, however, to identify any non-party witness who they expect to testify at trial, let alone specify the testimony of such a

witness. The Defendants therefore fail to meet their heightened burden under § 1404 by not identifying with particularity the unavailability and materiality of specific witnesses.

Fourth, and finally, the Defendants have not identified any public factors that weigh in favor of transferring this case to the Middle District of Pennsylvania. Thus, the Defendants have not satisfied their burden of persuasively demonstrating a compelling reason to overturn the Plaintiffs' choice of forum. Because the Defendants have not shown that the balance of convenience weighs heavily in their favor, this Court will not transfer this case to the Middle District of Pennsylvania.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RITA'S WATER ICE, INC. and	:	CIVIL ACTION
RITA'S WATER ICE FRANCHISE	:	
CORPORATION	:	
	:	
v.	:	
	:	
JOSIE'S WATER ICE, INC.,	:	
ALFRED H. EVERETTS, and	:	
RAYMOND B. OSTROSKI	:	NO. 98-6603

O R D E R

AND NOW, this 7th day of July, 1999, upon consideration of Defendants Josie's Italian Water Ice, Inc., Alfred H. Everetts, and Raymond B. Ostroski's Motion to Transfer Venue to the Western District of Pennsylvania (Docket No. 2), Plaintiffs' Response thereto (Docket No. 10), and the Defendants' Reply Brief (Docket No. 11), IT IS HEREBY ORDERED that Defendants' Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.